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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 50

VICTOR EMANUEL PEREIRA AND EUGENE H. BRADING, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The majority and dissenting opinions of the Court of Appeals (R. 148–159) are reported at 202 F. 2d 830.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1953 (R. 160). A petition for rehearing was filed March 26, 1953, and denied on April 3, 1953 (R. 161). The petition for a writ of certiorari was filed on April 30, 1953, and was granted on June 15, 1953 (R. 164). The jurisdiction of this Court is invoked under 28 U. S. C.

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1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court erred in admitting testimony by a divorced wife, who was the victim of a fraud, as to certain communications, asserted to be confidential, from her then husband, who was one of the perpetrators of the fraud.

2. Whether there was sufficient evidence of the mailing of the fraudulently obtained check to sustain the convictions of petitioners for using the mails in executing a scheme to defraud and causing the interstate transportation of an article obtained by fraud.

3. Whether conviction and the imposition of a cumulative sentence on a charge of conspiracy to commit the substantive offenses charged in the indictment amounted to double jeopardy.

4. Whether there was sufficient evidence to sustain the conviction on the conspiracy count.

STATUTES AND RULE INVOLVED

18 U. S. C. (Supp. V) 1341, provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office

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> or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon * * * any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U. S. C. (Supp. V) 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * * Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * * * *

18 U. S. C. (Supp. V) 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

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Rule 26, Federal Rules of Criminal Procedure

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

STATEMENT

Petitioners were convicted on three counts—one, ten, and eleven—of an indictment returned against them in the United States District Court for the Western District of Texas (R. 1–6),[1] all of which arose out of a scheme to defraud the then wife of Pereira. Count one charged that petitioners, for the purpose of executing this scheme, caused a letter to be mailed on June 15, 1951, to the Citizens National Trust & Savings Bank, Los Angeles, California, in violation of 18 U. S. C. 1341, *supra,* pp. 2–3 (R. 1–2). Count ten charged that on or about the same date petitioners caused a check in the amount of $35,286.78 to be transported in interstate commerce from El Paso, Texas, to Los Angeles, California, knowing such check to have been obtained by fraud,

[1] At the close of the Government's case, the Government moved to dismiss counts 2 through 9, no proof having been attempted as to those counts (R. 109).

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in violation of 18 U. S. C. 2314, *supra*, pp. 3 (R. 5–6). Count eleven charged petitioners with conspiring to commit the substantive offenses charged in the preceding counts (R. 6). The court sentenced both men to five years' imprisonment on count one, ten years on count ten to run concurrently with the sentence under count one, and two years on count eleven to commence at the expiration of the sentence on count ten (R. 143–144). On appeal, the judgment of conviction was affirmed as to both petitioners by the Court of Appeals for the Fifth Circuit, Chief Judge Hutcheson dissenting in part (R. 160).

At the trial the Government relied principally upon the testimony of the victim, Mrs. Joyce, who had been married to petitioner Pereira but was divorced from him by the time of the trial (R. 10). Corroboration of significant points of her testimony and proof of certain elements of the offenses charged in the indictment were, however, provided by other Government witnesses. Petitioners presented no witnesses and did not take the stand on their own behalf.

Mrs. Joyce gave the following account:

She first met petitioners when one of them, Brading (known to her as James Bradley Lee), approached her in the Del Norte Hotel in El Paso, Texas, on April 19, 1951, started a conversation, and invited her and her half-sister, Miss Joyner, to join him and a friend (petitioner Pereira) in the cocktail lounge (R. 12). This

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was followed by a trip to Juarez, Mexico, for dinner and a tour of the night spots (R. 13). Petitioner Pereira appeared to be delighted with her, told her that meeting her was an "epoch in his life," and represented that he was in the hotel business in Denver and was in the process of getting a divorce (*Id.*). Within a short time, petitioners were invited to stay as house guests at Mrs. Joyce's home in Roswell, New Mexico (R. 14). There Pereira received a telegram informing him that his divorce would be final on April 27, but that he would not receive his property settlement for another month (R. 15). Brading informed Mrs. Joyce that this delay with respect to the settlement was quite unfortunate for Pereira since it might cause him to miss out on some promising oil deals, and asked her whether she would not let Pereira borrow the money from her (*Id.*). She thereupon borrowed the $5,000 that Brading indicated was needed and loaned this sum to Pereira (R. 16).

A few days later, Pereira suggested to Mrs. Joyce that they take a trip together so that they might get better acquainted (R. 17). Mrs. Joyce agreed to this, and let Pereira have $1,000 to finance the trip, as he found himself "a little short of money" (R. 18). At Wichita Falls, Texas, their first stop, petitioner Brading joined them (R. 19), and a few days later, on about May 15, the three of them drove to Dallas (R. 22). Then, after spending a few days in Dallas,

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Pereira and Mrs. Joyce motored to Hot Springs, Arkansas, where they decided they were in love and would get married (R. 23). When Brading arrived at Hot Springs, Pereira told him in the victim's presence that in view of his impending marriage he would have to get out of the oil business and would get a hotel "here in East Texas because I must have an income * * *" (*Id.*). Shortly thereafter Pereira and Mrs. Joyce flew to Kansas City where they were married on May 25, 1951 (R. 24).

Two or three days after the wedding, Pereira began talking about the purchase of a hotel in Greenville, Texas (R. 27). It is this transaction that underlies counts one and ten of the indictment. In the presence of Brading, Pereira informed Mrs. Joyce that he had found a hotel that he thought he would be interested in buying, and proposed that the three of them, together with Miss Joyner, should stop at Greenville and look it over on their way to Dallas. When they went into the hotel, Pereira cautioned them not to indicate that they were interested in buying but just to "look at it from an outsider's viewpoint." (R. 28).

Over Pereira's objection that the testimony related to marital confidences, Mrs. Joyce went on to describe the way in which petitioners had defrauded her of $35,000. When they reached Dallas, Pereira had proposed that she go in with him on the deal. She accepted, and sought to

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have her broker in California sell some securities, but was unable to reach him at that time. Pereira then went to see his ostensible broker, one E. J. Wilson, in Fort Worth, and returned with what he represented to be an option to buy the hotel at Greenville. (R. 29.) Later Pereira told Mrs. Joyce that he had called his lawyer in Denver for the supposed purpose of getting $2,500 for the down payment (R. 30). Subsequently, she heard Pereira call his broker, Wilson, and ask for an extension on the option. A few days later the extension was confirmed by a telegram from Mr. Wilson. (R. 31.)

About the same time Mrs. Joyce, having meanwhile contacted her broker, received a check for about $35,000 (R. 32),[2] which shortly thereafter she endorsed to Pereira, who took it to the State National Bank at El Paso (*Id.*). A few days later Pereira made arrangements to go to Greenville with Mrs. Joyce to close the hotel deal on June 20. However, on the 19th he and Brading left in a Cadillac which he had bought with money loaned to him by Mrs. Joyce, and that was the last she saw of either of them until the trial. (R. 35.)

The essential elements of Mrs. Joyce's testimony were corroborated by other Government witnesses.

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[2] This check was introduced in evidence as Government Exhibit G-4 (R. 32).

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Mrs. Joyce's half-sister, Miss Joyner, testified that they had met petitioners in the way Mrs. Joyce had described, that a courtship started between Pereira and Mrs. Joyce, that Pereira had indicated he was about to get a divorce, and that they had stopped at Greenville so that Pereira might look over the hotel (R. 62–65). A relative of Mrs. Joyce testified that she had met Pereira, that he had said he loved Mrs. Joyce, and that he was the owner of several hotels and was going to Greenville to take an option on another (R. 84–86).

The clerks of the two Denver courts having divorce jurisdiction testified that there was no record that anyone with a name like Pereira had a divorce action pending during 1951 (R. 66, 76). The owner and the lessee of the Washington Hotel in Greenville both testified that, at the time Pereira ostensibly was negotiating for the purchase of the hotel, no one by the name of Pereira or Wilson had ever approached either of them about buying the hotel or obtaining any option to buy (R. 69, 77). A Denver friend of Pereira's testified that he received a letter from Pereira enclosing a printed telegram blank signed "Curtis," and that he had sent this telegram to Pereira at Roswell, New Mexico (R. 72–73). This witness identified a telegram addressed to Pereira in Roswell and signed Curtis as the one he had sent (R. 71). This telegram (Govt. Ex. 10, R. 68)

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stated that Pereira's divorce would be final on April 28th, but distribution of a property settlement of $48,000 would not occur until May 25th. An F. B. I. handwriting expert testified that the printing on the telegram blank was Pereira's (R. 102). Another Government witness, the operator of a telephone answering service in Fort Worth, identified petitioner Brading as a former customer who was known to the witness as E. J. Wilson (R. 108).

A vice president of the State National Bank at El Paso testified that Pereira had an account there, that a cashier's check payable to Pereira for $35,286.01 had been issued, and that the paying teller's stamp showed payment on June 19, 1951, the day petitioners had left Roswell in Mrs. Joyce's Cadillac (R. 94–99). A clerk in the same bank testified that Pereira came to his window and presented a check drawn on a California bank for about $35,000, that he had forwarded the check to Los Angeles for collection, that after payment by the Los Angeles bank he had issued a cashier's check to Pereira, and that the paying teller had asked him to identify Pereira, which he had done (R. 104–106). The bank vice president had testified earlier that the check had been forwarded to the Los Angeles Bank through the United States mails (R. 98–99).

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SUMMARY OF ARGUMENT

I

Petitioners' first contention is that the former wife of petitioner, Pereira, was improperly allowed to testify as to allegedly confidential communications made during their marriage. Under Rule 26 of the Federal Rules of Criminal Procedure, which provides that common law rules of evidence shall govern, the testimony was properly admitted because, (A) the communications were not, in fact confidential, (B) from the point of view of the husband asserting the privilege, the marriage was a sham, and (C) the communications, even if confidential, were offered in a criminal prosecution against the husband for an injury to his wife.

A. Since petitioner, Pereira, and the witness, Mrs. Joyce, were no longer married at the time of the trial, the rule against admitting the adverse testimony of a spouse is inapplicable. The claim that the testimony is to be barred, therefore, is based on the theory that it discloses a confidential communication made during the marriage, as to which the privilege against compulsory disclosure remains after the marriage. 8 Wigmore, *Evidence* (3d ed. 1940) § 2341. It is clear that the communications involved in this case were not in fact confidential. They related either (1) to matters which came to Mrs. Joyce's knowledge outside the marriage relationship, such as the

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source of certain checks, (2) to the acts of Mrs. Joyce or her then husband, Pereira, such as her passage of checks to him or his failure to return certain sums of money to her, which of course were not communications at all (cf. *United States* v. *Mitchell*, 137 F. 2d 1006, 1009 (C. A. 2)), certiorari denied, 321 U. S. 794, or (3) to matters as to which there was publication by Pereira himself, to Brading or others, or as to which such publication was reasonably to be expected, such as the various conversations between Pereira and Mrs. Joyce, some in private, some not, which related to the purchase by them of a hotel. To the extent that there is a small residuum of marital statements which were not revealed to outsiders, and not otherwise excepted from the privilege, we submit that they were so intimately connected with matters either already disclosed or fully expected to be, that any presumption of intended confidence disappears.

B. Although a marriage ceremony took place between Pereira and his former wife, Mrs. Joyce, on May 25, 1951, an examination of the events leading up to the marriage, as well as those of the three weeks of its life, show that the marriage was in fact merely a convenient tool used to expedite Pereira's getting, first, Mrs. Joyce's confidence, and then, her money. In these circumstances, the application of the privilege for marital confidences, designed to preserve domestic harmony, is singularly inappropriate. The recent holding of this Court in *Lutwak* v. *United States*,

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344 U. S. 604, requires a denial of the privilege here. This Court upheld the refusal to exclude testimony by wives against defendants whose marriages were shown to have been entered into only for the purpose of allowing them to enter the country under the War Brides Act, with the intention that the marriages be immediately thereafter dissolved. This Court reasoned that where "it is made to appear to the trial court * * * that the relationship was entered into * * * only for the purpose of using the marriage ceremony in a scheme to defraud * * * the reason for the rule disqualifying a spouse from giving testimony disappears, and with it the rule." 344 U. S. at 614–615. Since the rule disqualifying a spouse from giving any testimony at all, and the privilege against disclosure of confidential communications, serve the same purpose, preservation of marriage relationships, the *Lutwak* holding as to the disqualification is clearly applicable here to preclude sustaining the privilege.

The principal difference between *Lutwak* and the present case, the fact that there both spouses were parties to the fraud whereas here only one was, is not important since the party claiming the privilege here is the dishonest husband.

This same result has been reached in cases holding that the juror's privilege against disclosure of what he said in the jury room and the client's privilege to talk confidentially with an attorney, are dissipated when the party claiming

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the privilege was trying to take advantage of his own fraud. Cf. *Clark* v. *United States,* 289 U. S. 1, and cases cited.

C. Even if the marriage is held a sufficient basis for the application of the privilege, and even if the communications themselves are held to be confidential, it was still not error for the trial court to admit Mrs. Joyce's proffered testimony. Even at common law, an exception was made to the application of this privilege where the spouse's testimony was offered in a criminal proceeding against a spouse for personal violence against the witness spouse. 8 Wigmore, *Evidence* (3d ed.) § 2338. There have been extensions for this exception to the privilege to include cases where one spouse is charged with any offense involving the person or property of the witness spouse. Certainly the privilege should not be applied when one spouse is charged with an injury to the property of the other in a case where the relationship at its opening rested on so plainly fraudulent a basis as did the Pereira-Joyce marriage.

II

Petitioners contend that there was no proof that they mailed or caused to be mailed the $35,000 check, as alleged in the indictment. But there can be no question that there was sufficient evidence which, if believed, conclusively established that Pereira deposited in an El Paso bank a check drawn on a Los Angeles bank for collec-

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tion and did not receive cash therefor until the inter-bank mailings had been completed. The testimony of the bank vice-president from the bank records, and the clerk who authorized the final payment to Pereira (R. 98–99, 104–106) completely establish this point. In any event, it is clear that this testimony establishes that the check moved in interstate commerce, at petitioners' instance, which is sufficient to sustain the sentence (since the concurrent sentence on the interstate transportation substantive count exceeded that imposed on the mail fraud substantive count).

III

Petitioners also contend that the imposition of a cumulative penalty on the conviction for conspiracy cannot be upheld because of an alleged identity between the substantive offenses which were jointly committed, and the offense of conspiring to commit these offenses. Their argument is that since the jointly committed substantive offenses are themselves conspiracies, there cannot be additional punishment imposed under the conspiracy statute.

But, as this Court has often pointed out, a conspiracy is a separate and distinct offense, "* * * a partnership in crime" with "* * * ingredients, as well as implications, distinct from the completion of the unlawful project." *Pinkerton* v. *United States,* 328 U. S. 640, 644. Consequently, except as to cases where two persons

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must necessarily agree in order to accomplish the substantive crime (see *United States* v. *Katz*, 271 U. S. 354), the addition of a conspiracy count is upheld. Neither using the mails to defraud nor the interstate transportation of stolen property necessarily involves the cooperation of two or more persons, and it has always been held that conspiracy counts added to indictments for those offenses were proper. E. g., *Mansfield* v. *United States*, 155 F. 2d 952 (C. A. 5), certiorari denied, 329 U. S. 792 (mail fraud plus conspiracy); *Carlson* v. *United States*, 187 F. 2d 366 (C. A. 10), certiorari denied, 341 U. S. 940.

IV

Petitioners contend that there was no evidence of any agreement to use the mails to defraud or to transport stolen property across state lines, in absence of which, the conspiracy count must fall. But there was evidence from which the jury could find that petitioners conspired to commit the substantive offenses charged in the indictment. It is not necessary that petitioners have agreed, in so many words, to use the mails or interstate commerce in their scheme to fleece Mrs. Joyce. As is true of any other conspiracy, liability depends on the scope of the agreement between the parties. The basic agreement here was obviously broader than the use of the mails. The record fully supports the conclusion that Pereira and Brading were engaged in a conspiracy to defraud

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Mrs. Joyce, and further, that when it became apparent, to both, that the final fruition of the scheme would have to await a check on a California bank, they continued in it with full recognition that the mails would in natural course be used to collect the check, and that it would certainly have to be transported across state lines.

ARGUMENT

I

TESTIMONY BY THE FORMER WIFE OF THE PETITIONER PEREIRA, WHICH ALLEGEDLY RELATED TO CONFIDENTIAL COMMUNICATIONS DURING COVERTURE, WAS PROPERLY ADMITTED AT THE TRIAL

Petitioners' first contention is that their convictions must be reversed because the trial court improperly permitted Mrs. Joyce, the principal government witness, and the former wife of the petitioner, Pereira, to testify as to allegedly confidential communications made during their marriage. The contention is without merit because (1) the communications involved in this case were not confidential, (2) from the point of view of the husband asserting the privilege, the marriage was a sham, and (3) the communications, even if confidential, were offered in a criminal prosecution against the husband for an injury to the wife.

There is no dispute that the admissibility of the testimony depends upon the application of Rule 26 of the Federal Rules of Criminal Pro-

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cedure which adopts "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." (*Supra,* p. 4.) Application of this rule clearly requires the admission of the contested evidence in this case.

A. THE COMMUNICATIONS INVOLVED IN THIS CASE WERE NOT CONFIDENTIAL WITHIN THE MEANING OF THE MARITAL CONFIDENCE PRIVILEGE

Since petitioner, Pereira, and the witness, Mrs. Joyce, were no longer married at the time of the trial (R. 10, 8), the rule against admitting any adverse testimony of a spouse is inapplicable. *Yoder* v. *United States,* 80 F. 2d 665 (C. A. 10); 8 Wigmore, *Evidence* (3d ed.) § 2237. The claim that the testimony should be barred, therefore, must be that it discloses a confidential communication made during the marriage, as to which the privilege against compulsory disclosure remains in force after termination of the marriage (8 Wigmore, *supra,* § 2341).

It is, however, not enough to warrant application of the marital confidence privilege that there was a communication between husband and wife. The privilege serves only to safeguard communications which the parties at the time intended should be kept secret. It follows from the basic purpose of the privilege, which Wigmore notes "is to insure subjectively the free and unrestrained privacy of communication, divested of any apprehension of compulsory disclosure

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* * *" (8 Wigmore, *Evidence* (3d ed.) § 2336) that "wherever a communication, because of its nature or the circumstances under which it was made, was obviously not intended to be confidential it is not a privileged communication." *Wolfle* v. *United States,* 291 U. S. 7, 14. While there is a presumption that privacy was intended, this presumption may be overcome (see *Blau* v. *United States,* 340 U. S. 332, 333), and is always overcome by "the *presence of a third person* within hearing" or "the *intended transmission* of the communication to a third person." 8 Wigmore, *supra,* § 2336; see also, e. g., *Wolfle* v. *United States, supra* (where this Court held that a letter from a husband to a wife which the former had dictated to a secretary did not come within the privilege).

The record in the instant case contains circumstances which clearly negative any implication of confidence between husband and wife. The matters as to which Mrs. Joyce testified either were (a) learned by her from sources other than her husband, (b) related to acts which did not constitute communications, or (c) referred to matters which had either been previously disclosed to others or as to which such disclosure was plainly contemplated.

Thus, the first of petitioner's objections (Pet. Br. 16) related to testimony that Mrs. Joyce had given Pereira a check for about $7,000—the proceeds of stock sold on her behalf; that Pereira

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was to use this money for the purchase of a Cadillac, which he had said would cost $4,750; that Pereira assured her they would settle later as to what was left after paying for the car; and that, in fact, he kept the change (R. 25–26).

No marital confidence was disclosed by this testimony. Clearly, it was to matter coming to her knowledge outside of the marriage relationship that Mrs. Joyce testified in stating the circumstances in which she received a check from her broker. Clearly it was to her own acts, not to communications, that she testified in stating that she subsequently transferred the same check to Pereira. Clearly, too, it was to an act, this time of Pereira, that Mrs. Joyce testified that he had failed to return to her the difference between the amount of the check and what he stated the car cost.[3] Finally, it is clear that Pereira himself published important aspects of the conversation to which this testimony related. For the check

[3] Although it is true that some courts have applied the privilege to acts, see *People* v. *Daghita*, 299 N. Y. 194, 86 N. E. 2d 172, and *Menefee* v. *Commonwealth*, 189 Va. 900, 55 S. E. 2d 9, cited by petitioners, the privilege is commonly accepted as applying to utterances only. 8 Wigmore, *supra*, § 2337; *United States* v. *Mitchell*, 137 F. 2d 1006, 1009 (C. A. 2), certiorari denied, 321 U. S. 794. But even if the privilege is applied to some acts, those acts should include an element of intentional communication. *Daghita* and *Menefee*, *supra*, involve hiding stolen goods in the presence of the wife, which obviously suggests an implicit injunction of silence. Nothing of this nature was involved either in Mrs. Joyce's passage of a check to Pereira, or in his failure to return the change after buying the car.

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used in payment for the car was drawn to the order of Mrs. Joyce, and shows on its back her endorsement, as well as that of Pereira and one Studna, from whom Pereira bought the car (R. 26–27).

No better showing of confidence can be made on petitioners' second objection which related to testimony concerning a conversation which took place between the Pereiras very shortly after their marriage (Pet. Br. 16). Mrs. Joyce was allowed to testify that Pereira had offered her an opportunity to go into a hotel venture; that she had accepted, and had indicated she would have her broker sell some securities to raise the money; that Pereira had then said he would see his broker, one E. J. Wilson, about the deal; and that after being gone all day, Pereira had returned and announced that the deal was all set, that he had gotten the hotel "for a song" (R. 29).

Again, if we consider the specific nature of these communications, it is plain that they were not confidential. Pereira and his wife were discussing a business venture which had already been discussed in considerable detail in the presence of Brading and Kathryn Joyner (R. 28). The very hotel in question had been visited by all four together, with a specific injunction by Pereira not to disclose their real interest in surveying the property (*Id.*). Since Pereira's intention to go into the hotel business had thus

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been made known to Brading and to Mrs. Joyce's half-sister, and since they had actually seen the hotel, it would have been perfectly reasonable for Mrs. Joyce to have discussed her proposed participation in the venture with either of them. Clearly, Pereira does not appear to have cautioned her against doing so, and, indeed, there is reason to suspect he would have welcomed her consulting Brading on the matter.[4] Furthermore, the business nature of the entire conversation implies disclosure of its substance to interested third parties, as, for example, to the brokers or bankers through whom financial arrangements would be made, and so negatives a presumption of secrecy. Thus, Pereira, himself, had stated that he was going to see E. J. Wilson, his broker, about the matter.

The inconsistency of such business relationships and the marital confidence privilege has been implicitly recognized by the courts (cf. *Dobbins* v. *United States,* 157 F. 2d 257, 260 (C. A. D. C.); *Kansas City Life Ins. Co.* v. *Jones,* 21 F. Supp. 159 (S. D. Calif.); see also *Schmied* v. *Frank,* 86 Ind. 250, 257; *Commonwealth* v. *Wilson,* 190 Ky. 813, 229 S. W. 60; *Poulson* v. *Stanley,* 122 Calif. 655, 55 Pac. 605; *Parkhurst* v. *Berdell,* 110 N. Y. 386; 18 N. E. 123; *Sackman* v. *Thomas,* 24 Wash. 660, 64 Pac. 819), and by state statutes which, at

[4] Mrs. Joyce's own reluctance to having Brading too fully acquainted with her affairs (R. 58–59) obviously only emphasizes this point.

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least in civil cases, explicitly exempt from the privilege (or from the husband-wife competency rule) transactions where one spouse acts for the other. *E. g.,* Arkansas Statutes Anno. (1947) § 28–601; Illinois Revised Statutes (1945) § 51–5. Cf. Anno., 4 A. L. R. 2d 835. These holdings and statutes are relevant here as an expression of "reason and experience" within the meaning of Rule 26.[5]

Moreover, the conventional standard that communications intended to be transmitted to third parties are unprivileged, which, as is pointed out above, forecloses the privilege even as to good faith business discussions, operates here with special force in the peculiar circumstances of this case. The record makes abundantly clear, as is shown in more detail below, pp. 51–53, that Brading was a close confederate of Pereira in devising and

[5] See *Brooks* v. *Brooks*, 357 Mo. 343, 350, 208 S. W. 2d 279, 283: "The conversations here involved relate primarily to business matters, not marital confidences * * *. The better reasoned cases are to the effect that in actions between a husband and wife involving property rights the rule excluding relevant conversations between them in the absence of third persons as confidential communications yields to the necessity of the situation for the prevention of injustice and they are competent witnesses respecting such conversations. This harmonizes with our present public policy of constituting a married woman a femme sole for the purpose of transacting business, contracting, suing, being sued et cetera * * * and recognizing her rights in her separate property, real and personal, including earnings * * *." See also *Appeal of Spitz*, 56 Conn. 184, 187, 14 Atl. 776, 777.

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carrying out a scheme to defraud Mrs. Joyce.[6] Whatever might normally be thought of the confidential nature of husband-wife business communications, there would seem to be no question here that Pereira's "business" with his wife was not regarded by him as confidential in any way with respect to Brading, and therefore not properly the basis for him to claim a privilege.

The remaining conversations may be judged, and disposed of, on essentially the same principles. The conversations are summarized in the petitioners' brief as follows (Pet. Br. 16–17):

> Over the same objection, she [Mrs. Joyce] was permitted to testify that her husband went to Fort Worth to see about the hotel, told her that he had obtained an option on it and that he had paid $2,500 down, and produced a purported option (R. 30). He told her that he had telephoned his lawyer and obtained $2,500, which he had used to make the down payment (R. 30). About June 15, her husband told her that he had telephoned Wilson's secretary, and received a telegram granting an extension of the option (R. 30–31). When the check from Fewel & Company arrived, they discussed their affairs and decided that they would bank the money in El Paso because she didn't want everybody

[6] See pp. 51–53, *infra*. Note, particularly, that Brading early prevailed upon Mrs. Joyce to loan Pereira $5,000, so that he would have funds to invest in some oil leases (R. 15–16).

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> in Roswell, her home town, to know about the deal (R. 31). Pereira told her that he was going to El Paso to sign some papers in liquidation of his prior divorce, and for which money was waiting for him in El Paso (R. 32). She delivered and indorsed the check to him (R. 32). On June 18, 1951, Pereira told her that he was going to leave early next morning and be back early that afternoon, and that he would pay her what he owed her the next day (R. 34–35).

The conversations thus relate partly to further dealings in connection with the alleged purchase of the hotel, which, as we have suggested, either required or reasonably contemplated disclosure to others of the various facts which Pereira reported to Mrs. Joyce; and partly to the fact that Mrs. Joyce received and endorsed over to Pereira a check for some $35,000, which, as we have suggested in connection with the Cadillac check, could not be negotiated without making plain the most damaging fact as to which it was relevant, i. e., that Mrs. Joyce had got the money and turned it over to Pereira. The only other important testimony was that Pereira told her on June 18 that his June 19 trip would be a short one; but this could not have been confidential since the substance of the conversation was repeated the following morning in the presence of Brading (R. 34–35). It is thus clear that the major showing for which this third group of conversations was relevant: the check, its cashing, and

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the leaving, which, in concert create the most serious suspicion of Pereira's original intentions, are shown by testimony as to which there is no legitimate claim of privilege.

Finally, it is submitted that to the extent there may be a small residuum of marital statements in any of these three groups of conversations, which were not revealed to outsiders, they were so intimately connected with matter, either already disclosed or fully expected to be, that any presumption of intended confidence disappears. In this regard the situation is strikingly similar to that found by the Court of Appeals for the Second Circuit in *United States* v. *Mitchell,* 137 F. 2d 1006, 1009 (C. A. 2), certiorari denied, 321 U. S. 794, where the court declared:

> * * * In view of all that is thus admissible, what would be left is of very minor importance, hardly distinguishable from what is to be admitted. And we feel quite clear that under the circumstances whatever defendant said to her was not intended to be confidential and does not come within the privilege. * * * On her testimony he made no bones about issuing his directions for her work of prostitution in the presence of others; and it is the merest chance, not the nature of the communications or his desire to keep them confidential, which finds certain of his orders to her made to her alone.

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B. THE PRIVILEGE IS INAPPLICABLE WHERE THE ONLY PURPOSE OF THE MARRIAGE FOR THE HUSBAND CLAIMING THE PRIVILEGE WAS TO DEFRAUD HIS WIFE

Even if the communications involved in this case had been confidential, their admission in the trial court would still have been a proper application of the principles underlying the marital confidence privilege.

On May 25, 1951, a marriage ceremony took place involving Pereira and the witness (R. 10, 24). This followed a five-week courtship during which Pereira had managed, with the help of petitioner Brading, to get some $13,000 out of the witness on various pretexts (R. 16, 18, 24, 35). Within two or three days after the marriage, Pereira, with the further help of Brading, ostensibly initiated negotiations for the purchase of a hotel (R. 29), a venture which had been discussed by Pereira and Brading in the witness' presence even before the marriage (R. 23); and on May 28, 1951, Pereira proposed that Mrs. Joyce go in with him on the fictitious deal (R. 29).[7] On June

[7] At the time of this proposal, Pereira told Mrs. Joyce that he had to contact his broker, one E. J. Wilson, of Fort Worth, Texas (R. 29). The record shows that Brading had, on May 22, paid for a phone answering service in Fort Worth, which had been engaged by phone call from Dallas the day before (R. 107), and that in making payment, Brading had identified himself as E. J. Wilson (R. 108). The record also shows that about May 15, the two petitioners, Brading and Pereira, together with Mrs. Joyce had spent several days in Dallas; and that shortly after that Pereira and Mrs. Joyce went to Hot Springs, Arkansas, and decided to get married, which they did on May 25 (R. 22). Since Brading's registration

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15, 1951, less than three weeks after the marriage, and following what were obviously further efforts by the petitioners to convince Mrs. Joyce that the deal was real (R. 30–31), she endorsed over to Pereira a check for more than $35,000 (R. 32). Four days later, on June 19, 1951, Pereira received payment for the check, whereupon he departed with Brading in a Cadillac which he had bought with Mrs. Joyce's money two days after their marriage, and was not seen again by her until the trial (R. 35). Thus, from beginning to end, this purported marriage was nothing but a step in a scheme to defraud on the part of the one who now seeks to invoke the privilege.

"Reason and experience," which guide the federal courts in their application of common law evidentiary privileges (Rule 26, F. R. Crim. P., *Wolfle* v. *United States,* 291 U. S. 7, 12) plainly militate against invocation of the privilege in these circumstances. This Court, in *Lutwak* v. *United States,* 344 U. S. 604, recently held in similar circumstances that where "it is made to appear to the trial court * * * that the relationship was entered into * * * only for the purpose of using the marriage ceremony in a scheme to defraud * * * the reason for the [common law]

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as "Wilson" with the telephone answering service could only have been for a fraudulent purpose, and since, in fact, the device later proved useful in defrauding Mrs. Joyce, the inference is inescapable that the intent to defraud Mrs. Joyce preceded the supposed "marriage."

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ule disqualifying a spouse from giving testimony isappears, and with it the rule," 344 U. S. at 14–615. The Court noted, in so holding that it as not concerned with the validity or invalidity f the marriage, but merely with the question of hether a common-law principle of evidence hould apply. Since both the rule prohibiting estimony by one spouse against the other and he privilege with which we are concerned serve he same end, preservation of the marriage rela-ionship (*Wolfle* v. *United States, supra,* 291 J. S. at 14; 8 Wigmore, *supra* §§ 2332, 2333), what his Court said in the *Lutwak* case ought to be, in principle, controlling here.

It is true that in *Lutwak* the purpose of the marriage ceremonies was known to all partici-pants, whereas here Mrs. Joyce entered into the marriage in good faith. But here, as in *Lutwak,* t is not necessary to decide the general validity f the marriage. For the purpose of deciding hether the common law exclusionary rule should pply in his favor, it is enough that from Pereira's standpoint the marriage was a sham rom beginning to end. While, admittedly, the act that a marriage ends badly should not fore-lose the privilege as to confidential communica-ions made during an earlier more hopeful phase, hat clearly is not this case. Here, insofar as Pereira is concerned, the marriage was, as in *Lutwak,* merely a significant step in a scheme to

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defraud.[8] This was plainly not a marital relationship whose "sanctity and tranquility" (344 U. S. at 615) society has an interest in preserving. Rather, the interest of society would appear to lie on the other side, so as to favor exposure of those who use the form of marriage to achieve selfish and nefarious ends, particularly since the privilege, in any event, is an exception to the more general interest in making available all the data relevant to any specific controversy.[9]

Nor is it unusual to deny a privilege to one who seeks to use it to abuse the relationship which the privilege was designed to protect. This court held in *Clark* v. *United States*, 289 U. S. 1, that a juror who had, on her *voir dire* examination, deliberately failed to disclose facts on the basis of which her bias might have been inferred

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[8] It is a *difference* between *Lutwak* and the present case, that, in *Lutwak*, it was necessary for the jury to find that the marriages were intended to be shams in order to find the defendants guilty of the crimes charged, whereas there could, in the present case, be a finding of the substantive violation, without the conclusion by the jury that the marriage was intended *merely* to be a form to aid in the fraud. However, we do not regard the difference as a significant one in deciding whether the privilege should be applicable. The evidentiary ruling is one of competence, within the province of the judge alone, particularly since it does not coincide with the ultimate issue in the case. Cf. Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv. L. Rev. 165.

[9] "The privilege suppresses relevant testimony and should be allowed only when it is plain that marital confidence cannot otherwise reasonably be preserved." *Wolfle* v. *United States*, 291 U. S. 7, 17.

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could not invoke the privilege normally available of keeping jury deliberations confidential. Mr. Justice Cardozo, for the Court, stated, *inter alia* (289 U. S. at 13–14):

> Assuming that there is a privilege which protects from impertinent exposure the arguments and ballots of a juror while considering his verdict, we think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued. * * * The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth.

The Court in the *Clark* case, moreover, recognized a similar kind of approach to the lawyer-client privilege as a relevant analogy, pointing out that a "client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." 289 U. S. at 15; *semble, O'Rourke* v *Darbishire,* [1920] A. C. 581, 604; 8 Wigmore, *supra,* §§ 2298, 2299.

The *Clark* case does not undertake, nor do we, any attempt to compare the relative importance of the various privileges. That is not relevant. What is relevant is that it is absurd to sustain a privilege, any privilege, in behalf of one who

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has fraudulently brought himself within the area in which the privilege normally operates. Compare American Law Institute, *Model Code of Evidence,* Rules 212, 217, 222. That principle, of which *Lutwak* is only a recent and especially compelling expression, is controlling in the present case.[10]

C. THE PRIVILEGE MAY NOT BE CLAIMED WHERE THE PURPOSE OF THE PROPOSED TESTIMONY IS TO PROVE AN INJURY BY THE DEFENDANT TO THE WITNESS

Even assuming that the Pereira-Joyce marriage must be treated as a valid basis for the

[10] No complaint can be made at this time of the trial judge's failure to make an explicit ruling that the marriage was a sham before admitting Mrs. Joyce's testimony relating to allegedly confidential communications. There was a sufficient basis on the record at the time of this testimony for such a ruling. The challenged conversations relate to certain events after the marriage ceremony of May 25, but before Mrs. Joyce's testimony got to that point, she had already testified to Pereira's whirlwind romance with her, his groundwork statements about his hotel business, his divorce (R. 13), and the fact that he was to get a settlement later of about $48,000 (R. 15, 17). She had already testified that Brading had induced her to lend $5,000 to Pereira on a representation that Pereira would otherwise lose out on a profitable oil deal (R. 15–16); that Pereira had later borrowed another $1,000 from her, for expenses (R. 17–18); that he had told her he had given two hotels to his first wife, Ada (R. 22); that Brading and Pereira had discussed Pereira's need for the steady income a hotel would produce in her presence (R. 23); and that Pereira was trying to pressure her into buying a Cadillac with her money (R. 23–24). This was sufficient. Compare *United States* v. *Graham*, 87 F. Supp. 237 (E. D. Mich.). In any event, since on the whole record there is no doubt about the purpose of this marriage, there is no occasion for reversal.

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privilege, and that some of the communications in issue in this case must be regarded as in fact confidential, it was still proper for the Court to admit the contested testimony. These communications fall within a well-recognized exception to the application of the privilege for cases in which the testifying spouse has been wronged by the other.

Such an exception clearly existed at common law,[11] both with respect to the rule prohibiting any testimony by one spouse against the other and, later, with respect to the rule prohibiting privileged communications during marriage (8 Wigmore, § 2338), although there is some indication that it was at first limited to cases involving prosecution for a personal injury to the spouse. See *Bassett* v. *United States,* 137 U. S. 496, 506; *State* v. *Kephart,* 56 Wash. 561, 562–563, 106 Pac. 165; *Overton* v. *State,* 43 Tex. 616. Courts of Appeals in a number of federal judicial circuits, however, have invoked that exception in order that a wife who had been forced into immoral activities by her husband might be *competent* to testify generally against him. *Denning* v. *United States,* 247 Fed. 463 (C. A. 5); *Pappas* v. *United States,* 241 Fed. 665 (C. A. 9); *Cohen* v. *United States,* 214 Fed. 23 (C. A. 9), certiorari denied, 235

[11] It is said to date from *Lord Audley's Case*, decided in 1631, Hutt. Rep. 115, 3 How. St. Tr. 401, where the husband had instigated rape against his wife. The exception was put on the ground of the necessity of using the wife's testimony.

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U. S. 696; *United States* v. *Mitchell,* 137 F. 2d 1006 (C. A. 2), certiorari denied, 321 U. S. 794; *Hayes* v. *United States,* 168 F. 2d 996 (C. A. 10). It has made no difference in those cases that theoretically the offense is "not a crime against the person of the wife, but a crime against interstate commerce" *United States* v. *Mitchell, supra,* at 1008. And in *United States* v. *Graham,* 87 F. Supp. 237 (E. D. Mich.), a wife was held to be competent to testify against her husband, where, as here, he was on trial for transporting in interstate commerce a sum of money taken from her by fraud.

While no federal cases have been found expressly ruling on the point, "reason and experience" dictate that the exception should apply equally to the marital confidence privilege. Wigmore's assertion that at common law the marital confidence privilege as well as the incompetency rule were subject to exception in the case of injuries done by one to the other seems to be based in part on the logic and purposes of the two rules. 8 Wigmore, *supra,* § 2338; see also *State* v. *Kephart, supra.* While he cites no common law cases, Wigmore notes several state cases decided under statutes that allow, either expressly or by construction, the wife's testimony as to conversations with her husband where she had been victimized by him. *Jordan* v. *State,* 142 Ind. 422, 424, 41 N. E. 817; *Rice* v. *Waddill,* 168 Mo. 99, 67 S. W. 605; see also *Beyerline* v. *State,* 147 Ind. 125, 133, 45 N. E. 772. It is patent, moreover,

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that the "necessity" which justifies the acceptance of testimony by one spouse against the other (see 8 Wigmore, *supra,* § 2239, and cases cited, n. 1), applies equally to the privilege. The injustice of allowing the perpetrator of a crime to go unpunished because of the enforced silence of the aggrieved spouse, who will often be the only witness thereto, is manifest, and would be vividly exemplified were the present petitioners to be relieved from their wrong on this ground.

The lack of reason for the privilege in circumstances like those here presented was recognized by the American Law Institute in its *Model Code of Evidence,* which eliminated the incompetency rule but provided for a confidential communications privilege (Rule 215). The Code specifically provided that the privilege should not apply in a criminal action in which one of them is charged with "a crime against the person or property of the other * * *" (Rule 216 (c) (i)). A recommendation for a similar provision excepting from the marital confidence privilege prosecutions for crimes "arising out of an alleged injury or threatened or attempted injury to the person or property of either spouse * * *" was made to the Massachusetts legislature by the Judicial Council of that state. See Twenty-Second Report of the Judicial Council of Massachusetts for the year 1946, 32 Mass. Law Quarterly, No. 1, pp. 69, 75. A statute of similar effect is operative in Illinois. Ill. Rev. Statutes (1945), ch. 38, sec. 734.

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There are, moreover, statutes in some fourteen states [12] which except from the operation of the marital confidence privilege cases in which the defendant spouse is accused of a crime against the testifying spouse; and, while there is some support for the view that this covers only charges of physical violence against the spouse (see *State* v. *Kephart,* 56 Wash. 561, 106 Pac. 165; *Bassett* v. *United States,* 137 U. S. 496 (construing Utah statute)), there is also support for what we believe to be the more correct view that this covers property offenses against the spouse as well. See *Emerick* v. *People,* 110 Colo. 572, 136 P. 2d 668, and *O'Loughlin* v. *People,* 90 Colo. 368, 10 P. 2d 543.

Indeed, the exception has been recognized by the United States Court of Appeals for the Second Circuit in a case on which petitioners mistakenly reply. In *United States* v. *Walker,* 176 F. 2d 564 (C. A. 2), certiorari denied, 338 U. S. 891, the court recognized this exception but

[12] Arizona Code Anno. (1939), § 44–2702; California Code of Civil Procedure (Deering, 1949), § 1881; Colorado Statutes Anno. (1935), Chapter 177, § 9; Idaho Code (1947), § 9–203; Minnesota Statutes Anno. (1947), § 595.02 (1); Montana Revised Codes Anno. (1947), § 93–701–4; Nevada Compiled Laws (1929), § 8971; North Carolina General Statutes (1943), § 8–57; North Dakota Revised Code of 1943, § 31–0102; Oregon Compiled Laws Anno. (1940), § 3–104; South Dakota, Code (1939), § 36.0101; Utah Code Anno. (1953), § 78–24–8; Washington (Remington's Revised Statute, 1931), § 1214; Wyoming Compiled Statutes (1945), ch. 3, § 2605.

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found it inapplicable for reasons not pertinent to this case. The court stated (176 F. 2d at 568):

> We do not forget that a wife from the earliest times was competent to testify against her husband, when the crime was an offense against her person; and we have ourselves extended the exception to the crime of transporting her as a prostitute in interstate commerce * * *. The same exception probably extends to the privilege against the admission of confidential communications. The case at bar is not, however, within this exception for Clara Duer Walker [the wife] was not the victim of the frauds for which the defendant was being tried.

Here, on the other hand, the wife was herself the victim of the fraud, and could, therefore, testify in connection with the injury done her.

In principle, it is submitted, that those states which have, legislatively or judicially, ruled that one who defrauds his spouse may not claim the marital confidence privilege, are correctly applying the common law with guidance from reason and experience. It is an obvious abuse of the marriage relationship to defraud a spouse. It is almost certain to be the case in any such situation that the defrauding spouse will have preyed on the trust built into the marriage to accomplish his purpose. It serves no purpose to stand guard over a marriage whose foundations have been thus corrupted; and there is no reason

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why the federal courts committed to the standard of reason and experience, set in the flexible tradition of the common law, cannot say as much.

It may be that a court would be reluctant to take this view if faced with a marriage of long tenure. But here there is no such problem. The record clearly shows that the marriage itself was merely a convenient device to hasten the fleecing of Mrs. Joyce. Therefore, even if this Court should determine that, as a general proposition, a husband's fraud against his wife does not justify an exception to the marital confidence privilege, still, it should hold that it does so when it appears that the husband's fraud pervades the marriage at its inception, and where within a few weeks, the fraud accomplished, the marriage ended. Compare American Law Institute, *Model Code of Evidence,* Rule 217; *Fraser* v. *United States,* 145 F. 2d 139, 143–144 (C. A. 6), certiorari denied, 324 U. S. 849.

II

THERE WAS SUFFICIENT PROOF OF THE USE OF THE MAILS AND OF INTERSTATE COMMERCE TO SUPPORT THE CONVICTIONS FOR THE SUBSTANTIVE OFFENSES

Petitioners contend that their convictions must be reversed because there was no proof that they mailed, or caused to be mailed,[13] the $35,000

[13] Under Section 2 of the Criminal Code (18 U. S. C., Supp. V, 2) a person who "wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

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check, as alleged in the indictment (Pet. Br. 29–32).

Evidence which, if believed, established conclusively that Pereira deposited a check for collection and that this check was, in fact, sent through the mails, was provided by the testimony of the Vice President of the State National Bank of El Paso, who appeared as a witness for the Government and testified as follows (R. 98–99):

> **Q.** Does your record show what your bank did with this instrument [the check for $35,000 endorsed to Pereira by Mrs. Joyce] when it was deposited there for collection?
>
> A. Yes. The item was presented to us on June 15th for collection, entered for collection on that date. We sent direct to the head office of the Citizens National Bank, where the check was drawn on, by mail.
>
> The COURT. Citizens National Bank where?
>
> The WITNESS. Los Angeles.
>
> * * * * *
>
> A. With instructions to wire fate. * * * That means * * * to wire us if the item is paid or if it is not, to wire us in either event.
>
> The COURT. But you sent the check through the United States mail?
>
> The WITNESS. Yes, sir.
>
> The COURT. To this bank in Los Angeles, California?
>
> The WITNESS. That is correct.

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A. Wire advice of payment was received June 16th, stating that this check had been paid and they were crediting our account with the proceeds.

Q. Then on June 19th you gave Victor Pereira that amount of money?

A. That is correct, yes, sir.

Thereafter, a clerk of the bank at El Paso testified that Pereira was the man who had presented a check drawn on a Los Angeles bank for collection, that later on when the item came back from Los Angeles he had issued a cashier's check to Pereira, and that he had identified Pereira for the paying teller at the time Pereira cashed the cashier's check (R. 104–106).

Although the testimony does not show, in so many words, that either of these witnesses personally deposited the check in the mails, it is clear that the records of the bank, including a copy of the letter of transmittal which accompanied the check, showed that the check had been mailed in regular course (R. 98–100), and that a response had come to the bank's request to "wire fate". This was sufficient. See *United States* v. *Leathers*, 135 F. 2d 507, 510 (C. A. 2).[14]

[14] The *Leathers* case distinguished the cases on which petitioners rely, on the ground that in both, *Mackett* v. *United States*, 90 F. 2d 462, 464–65 (C. A. 7), and *United States* v. *Baker*, 50 F. 2d 122, 123 (C. A. 2), substantially all the proof of the mailing was the fact that two different cities, or banks in two different cities, were involved, and the normal inference that the letters or checks were sent by mail from one to

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But, it is clear in any event that the sufficiency of the proof of mailing is unimportant. For purposes of affirming the judgments below, it is not necessary to sustain the five year sentences imposed for the mail fraud violations, since concurrent ten year sentences were imposed for having caused property obtained by fraud to be transported in interstate commerce. See *Hirabayashi* v. *United States,* 320 U. S. 81, 85; *Pinkerton* v. *United States,* 328 U. S. 640, 641–642, fn. 1. Proof of the latter offenses depends only on an interstate transportation, of whatever sort, mails or otherwise. For this, the fact alone that the check, which had to be transported to Los Angeles before it could be honored, was in fact cashed in El Paso is sufficient.[15]

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the other. There was no testimony in either case which eliminated the possibility that the checks might have been delivered by hand.

[15] Petitioners do not contend that, even if the mailing was satisfactorily proved, there were still no substantive violations of the mail fraud and stolen property statutes, for the reason that they personally did not actually deposit the check in the mail. It is clear that such a contention, were it made, could not be sustained. Thus, since fruition of the scheme depended upon completion of the collection process, it is clear that the mail fraud statute was violated by the bank mailing. See *Kann* v. *United States*, 323 U. S. 88, 94, and cases cited, fn. 7. Likewise, the check was an article obtained by fraud within the meaning of 18 U. S. C. (Supp. V) 2315, and the transportation procured by depositing it for collection is an offense under that statute. See *United States* v. *Sheridan*, 329 U. S. 379.

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III

PETITIONERS' CONVICTIONS FOR THE SUBSTANTIVE OFFENSES CHARGED AGAINST THEM, FOLLOWED BY A CUMULATIVE SENTENCE ON THE CONSPIRACY COUNT, DO NOT CONSTITUTE DOUBLE JEOPARDY

Petitioners also contend that their convictions must be reversed as to the conspiracy count because of an alleged identity between the substantive offenses, which were jointly committed, and the conspiracy to commit those offenses. Their argument is that the jointly committed substantive offenses were, in essence, conspiracies; and that therefore, there cannot be additional punishment imposed under the conspiracy statutes. (Pet. Br. 24–26.)

It is true that both petitioners were convicted of committing the substantive offenses charged in counts one and ten of the indictment, but it by no means follows that the additional punishment imposed under count eleven, the conspiracy count, was for the same offenses. The fact that two persons are convicted of committing the same substantive offense, does not mean that they were convicted of conspiring to commit that offense. The conspiracy is distinct from the crime which is its object. As this Court said in *Pinkerton* v. *United States,* 328 U. S. 640, 644:

> A conspiracy is a partnership in crime. * * * It has ingredients, as well as implications, distinct from the completion of the unlawful project.

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It is true that where two persons must necessarily agree in order to accomplish the substantive crime, it is improper to add a conspiracy count, since all of the elements of a conspiracy are present in the completed substantive crime (*United States* v. *Katz,* 271 U. S. 354), but neither using the mails in a scheme to defraud nor the interstate transportation of stolen property necessarily involves the cooperation of two or more persons. Cf. *United States* v. *Zeuli,* 137 F. 2d 845 (C. A. 2).

The basic test to be applied in determining whether one series of acts may be punished as two offenses is whether each offense requires the proof of a fact which is not essential to the other. *Blockburger* v. *United States,* 284 U. S. 299. That different elements are involved in a substantive violation of the mail fraud statute and in a conspiracy to violate it, is particularly clear. It is enough to establish the substantive mail fraud offense against Pereira that he caused the check to be mailed in the execution of a scheme to defraud. To sustain Brading's conviction of this same substantive offense, it is only necessary that the mailing was in fact within Pereira's authority to carry out the joint criminal enterprise. *Pinkerton* v. *United States,* 328 U. S. 640; *Hart* v. *United States,* 112 F. 2d 128 (C. A. 5); *Baker* v. *United States,* 115 F. 2d 533, 540 (C. A. 8); *Steiner* v. *United States,* 134 F. 2d 931 (C. A. 5), certiorari denied, 319 U. S. 774; *Weiss* v. *United*

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States, 120 F. 2d 472 (C. A. 5). It is not necessary for this purpose to show any agreement to use the mails, although if in fact there was such an understanding, which we show below was actually the case, pp. 51–53, the conclusion that there was authority for Pereira to send the check to Los Angeles was valid, *a fortiori.*

On the other hand, with respect to the conspiracy count, such an agreement is the essence of the offense. To establish it, circumstances must be shown from which can be inferred not only an intent to defraud, but an intent to make use of the mails in executing the fraud. *Farmer* v. *United States,* 223 Fed. 903, 907 (C. A. 2); *Preeman* v. *United States,* 244 Fed. 1, 17–18 (C. A. 7), certiorari denied, 245 U. S. 654. For this purpose, of course, it is irrelevant that the mails actually were used, save as the actual events tend to show that there was an agreement involving use of the mails.

Since different elements are thus involved, it has consistently been held that a charge of conspiracy to violate the mail fraud statute survives a failure to prove substantive counts brought under that statute (*Mackett* v. *United States,* 90 F. 2d 462 (C. A. 7); *Morris* v. *United States,* 7 F. 2d 785 (C. A. 8)) and convictions under indictments charging violation of both the mail fraud and the conspiracy statutes have consistently been upheld by Courts of Appeals. *Mansfield* v. *United States,* 155 F. 2d 952 (C. A. 5),

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certiorari denied, 329 U. S. 792; *Blue* v. *United States,* 138 F. 2d 351 (C. A. 6), certiorari denied, 322 U. S. 736; *United States* v. *Leathers,* 135 F. 2d 507 (C. A. 2); *United States* v. *Bender,* 60 F. 2d 56 (C. A. 2).

On essentially the same reasoning, it is equally clear that different elements are involved in a substantive violation of the statute prohibiting interstate transportation of stolen goods and in a conspiracy to violate that statute. Thus, both petitioners can be convicted for violation of the substantive statute without showing more than that Pereira knowingly presented the check for collection through interstate commerce, and that this was within the scope of his general authority to carry out the joint criminal enterprise, whereas, "the gist of the charge of conspiracy was not the transportation but the unlawful plan and agreement of the conspirators." *Allen* v. *United States,* 89 F. 2d 954, 955 (C. A. 4); see also *Carlson* v. *United States,* 187 F. 2d 366 (C. A. 10), certiorari denied, 341 U. S. 940.

IV

THERE WAS AMPLE EVIDENCE TO SUPPORT THE JURY'S FINDING THAT THE PETITIONERS CONSPIRED TO COMMIT THE SUBSTANTIVE OFFENSES CHARGED IN THE INDICTMENT

Petitioners' final contention is that there was no evidence of any agreement to use the mails to defraud or to transport stolen property across

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state lines, in absence of which, of course, th
conspiracy count must fall. The record, viewe
against the standards established in conspirac
cases for showing the existence of intention t
use the mails to defraud,[16] refutes this contentio

Proof of the conspiracy count, unlike the sub
stantive counts, requires evidence from which th
jury might reasonably infer an agreement to us
the mails in executing the fraud. But in applyin
this standard, it has to be remembered that i
very few conspiracies is the use of the mai
explicitly agreed to. People conspire to defrau
other people by techniques and in circumstance
where the use of the mails is, in greater or lesse
degree, implicit. The question is whether th
basic scheme shows sufficiently that a mailing
reasonably necessary to complete the scheme, s
as to make it fair to say that the conspirator
agreed upon the use of the mails. Obviously, th
is sometimes clear from the beginning of th
venture, and sometimes becomes clear only a
the venture proceeds. For, just as conspiracie
grow, as people are added to them, so the detaile
acts to be performed to accomplish a venture ma
be added to or changed as the circumstances i
which the fraud must be executed change. C

[16] The conspiracy count is established if petitioners a
shown to have agreed to commit either of the substanti
offenses charged, since a conspiracy to commit a multiplici
of offenses is no different in legal effect from a conspira
to commit a single offense. Cf. *Braverman* v. *United State*
317 U. S. 49.

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Blumenthal v. *United States,* 332 U. S. 535. The basic requirement was expressed by the Court of Appeals for the Second Circuit in *Farmer* v. *United States,* 223 Fed. 903, at 907, as follows:

> When * * * the charge is conspiracy to commit the offense specified in section 215, it is necessary to prove an intent, not only to defraud, but also to defraud by the use of the mails.

And the limitation was also stated that (*id.*):

> Direct evidence of intent is rarely available; it may be shown by circumstances. Usually when the scheme is unfolded it is apparent that it could not be carried out without using the mails, and a jury is therefore warranted, without further proof, in drawing the inference that those who devised the scheme intended to use the mails.[17]

See *Blue* v. *United States,* 138 F. 2d 351, 360 (C. A. 6). In this respect, mail fraud conspiracies are no different from other conspiracies, which, as this Court has remarked, "may be found in a course of dealing or other circum-

[17] While the court failed to find that use of the mails was contemplated, since the scheme was one which relied primarily on personal representations as to the worth of supposedly rare books, payment was by check, and it would appear probable that bank mailings would have been required before the full fruits of the fraud could be realized. However, the court appears to have assumed that the scheme ended with receipt of the check, and it did not consider the effect of mailings procured thereafter by depositing the check, if, in fact, there was such.

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stances as well as in an exchange of words * * *." *American Tobacco Co.* v. *United States,* 328 U. S. 781, 809–810. See *Glasser* v. *United States,* 315 U. S. 60, 80, where this Court observed that "a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *United States* v. *Manton,* 107 F. 2d 834, 839 (C. A. 2).

In mail fraud cases such circumstances are most obviously present when the scheme to defraud is one which could not be carried out without the mails. Thus, for example, the maintenance of a large office force may give notice to all who participate in the scheme that the mails will be used *Blue* v. *United States, supra.* Similarly, where the essence of the scheme is the solicitation by mail prospective purchasers of fraudulent securities, it can be inferred that "all who took part understood that the mails would be used in the course of the scheme." *United States* v. *Cohen,* 145 F. 2d 82, 91 (C. A. 2), certiorari denied 323 U. S. 799. See also *Preeman* v. *United States,* 244 Fed. 1 (C. A. 7); *Ader* v. *United States,* 284 Fed. 13 (C. A. 7); *Morris* v. *United States,* 7 F. 2d 785 (C. A. 8); *Stephens* v. *United States,* 41 F. 2d 440 (C. A. 9).

Such an understanding may also exist where, as here, the scheme does not contemplate correspondence among the conspirators or from them to their intended victims, but involves the mailing of checks for collection by the banks at which they were deposited by the defrauders, since collec-

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tion by the banks was necessary to allow the defrauders to get the money and complete the frauds. *Spear* v. *United States,* 228 Fed. 485 (C. A. 8); *Goodman* v. *United States,* 97 F. 2d 197 (C. A. 3). See, *United States* v. *Leathers,* 135 F. 2d 507 (C. A. 2), where the fraud was carried out without using the mails by means of false representations as to the value of certain oil leases. The victim, Miss Bayer, at various times paid the appellants substantial sums of money, a part of which was in the form of checks drawn on several New York banks, which were deposited for collection at banks in Springfield, Illinois, and were forwarded by mail to the drawee banks in New York. The appellants were charged with three substantive offenses against the mail fraud statute, and with conspiring "to commit the frauds set forth * * * through the use of the mails" (135 F. 2d at 509). The Court of Appeals in affirming the convictions on both the substantive and conspiracy counts, noted that "Everyone knows that checks sent by banks from distant parts of the country are almost invariably forwarded by mail" (135 F. 2d at 510). In addition, there was testimony by bank officials that, in fact, the mails had been used.

The *Leathers* case seems clearly to hold that a conspiracy to defraud will be converted into a conspiracy to defraud by use of the mails upon receipt from the victim of a check drawn upon an out-of-town bank. This is an entirely reason-

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able result, for, as is well-settled, those depositing such a check for collection may be found to know that the mails will be used (see *Kann* v. *United States,* 323 U. S. 88, 94; *Goodman* v. *United States,* 97 F. 2d 197, 199 (C. A. 3)), and, of course, to know also that full execution of the fraud requires that this be done. The fact that only one of the conspirators actually presents the check is not decisive, if there is evidence from which it can be inferred that the other participants knew or had reason to believe that the victim would pay by means of an out-of-town check. When payment by such a check is made or expected to be made, all who continue with the scheme to defraud with such knowledge clearly anticipate that the mails will be used in the course of collection. The scheme to defraud then becomes one which necessarily will involve the mails in its execution, and all who participate therein may be found guilty of conspiring to violate the mail fraud statute.

We think it clear that in the present case there was evidence from which the jury could have found that both conspirators knew sooner or later that an out-of-town check was involved and that its collection would involve use of the mails. While initially it may not have been apparent to petitioners that recourse to the mails would be required, this, as we have stated, is not controlling. The jury could, and did, find that at some time

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prior to the actual mailing of the check for collection petitioners both had reason to believe that such a mailing was indispensable to fruition of the scheme.

There was an abundance of evidence from which the jury could and did infer that Brading and Pereira were in close and continued association throughout the duration of the fraudulent scheme. Brading was the one who first met Mrs. Joyce and introduced her to Pereira (R. 12). He accompanied Pereira and Mrs. Joyce during all the early phases of the "courtship"; and was always close at hand during the various trips taken by Mrs. Joyce and Pereira before the marriage.[18] Less

[18] Brading went with Pereira and Mrs. Joyce on their first trip to Mrs. Joyce's home in Roswell, New Mexico (R. 14). Shortly thereafter, when Mrs. Joyce and Pereira went back to El Paso, Texas, Brading turned up there, much to Mrs. Joyce's surprise (R. 17); after which they all had a social evening in Juarez, Mexico, and then went back to Roswell together (*Id.*). Mrs. Joyce and Pereira shortly thereafter went on a trip together, stopping first at Wichita Falls, Texas, and Brading showed up there (R. 19). Brading thereafter drove with Pereira and Mrs. Joyce to Dallas, Texas (R. 22). Mrs. Joyce and Pereira then drove to Hot Springs, Arkansas, where they decided to get married, and almost immediately after the decision was made, Brading showed up, this time, ostensibly, as a result of a phone call from Pereira (R. 23). As Pereira and Mrs. Joyce had decided to get married in Kansas City, Missouri, and to buy a new Cadillac there from a friend of Pereira's, with Mrs. Joyce's money (R. 24), Brading drove Mrs. Joyce's car back to Roswell, New Mexico, and then joined Pereira and Mrs. Joyce, who had flown to Kansas City, in time for their wedding there (R. 25).

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than ten days after first meeting Mrs. Joyce, Brading induced her to loan Pereira $5,000 to invest in some promising oil leases (R. 16). After the wedding he was present when Pereira began talking about making the hotel deal, and in Mrs. Joyce's presence he and Pereira "discussed it pro and con" (R. 28).[19] Brading, it developed at the trial, was the "E. J. Wilson" whom Pereira had called in order to get an extension while waiting for Mrs. Joyce's check to arrive from California, and who ostensibly sent a telegram granting the extension (R. 31, 83, 108).[20] Shortly after the check arrived and was deposited for collection by Pereira, Brading rejoined the Pereiras and stayed as a guest in their home (R. 34). On June 19th, Brading and Pereira left Mrs. Joyce's home in Roswell, New Mexico, together, ostensibly to pick up some oil leases (R. 35). That was the day on which pay-

[19] Mrs. Joyce testified of this period, with perhaps a trace of exasperation, that Brading "was usually around some place" (R. 28).

[20] Moreover, the record shows that the phone service arrangement set up in the name of E. J. Wilson was set up by a phone call from Dallas on May 21, which was very shortly after Pereira, Mrs. Joyce and Pereira had all been in Dallas together, and just about the time that Mrs. Joyce and Pereira had got to Hot Springs, Arkansas, where Pereira and Mrs. Joyce decided to get married (R. 23). The inference is unavoidable that the decision to use the marriage and "E. J. Wilson" to give authenticity to the fleecing arrangement was discussed at Dallas by Brading and Pereira.

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ment of $35,000 was made to Pereira by the El Paso bank (R. 98).

In view of the foregoing showing of close cooperation between Brading and Pereira in carrying out their scheme to defraud, it is unthinkable that Pereira would have withheld from his inseparable associate in crime the intelligence that Mrs. Joyce had taken their bait and was selling her securities in California. The inference gains strong support from the fact that Pereira received a telegram from Fort Worth signed "Wilson", which extended the option until Mrs. Joyce's money arrived from California (R. 31, 83).[21]

These circumstances warrant the jury's inference that both petitioners knew that their plan would be incomplete without collection of the California check, and that this would have to be effected across state lines. In a similar case (*United States* v. *Leathers*, 135 F. 2d 507, 511–512) the Court of Appeals for the Second Circuit answered the contention of one of the appellants that he had not knowingly participated in the frauds as follows:

> It is reasonable to suppose that Thomas was unlikely to have been in such close

[21] The wire was sent from Fort Worth at a time when, as the record makes clear, Pereira, himself was in Roswell with his "wife", and could not have sent it (R. 31). In view of Brading's activity in connection with the E. J. Wilson arrangements (R. 108), and in view of his arrival at Roswell shortly thereafter (R. 34), it is impossible not to believe that he sent the wire.

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> cooperation with the other defendants without knowing what they were about and participating in their schemes. In any event his knowledge and participation were questions properly for the jury and there can be no merit in the contention that a verdict should have been directed for the appellant Thomas.

We submit that this verdict of the jury must be sustained, particularly since, as this Court has remarked, reviewing courts will take the view of the evidence "most favorable to the Government to support it." *Glasser* v. *United States,* 315 U. S. 60, 80; see also *United States* v. *Manton,* 107 F. 2d 834, 839 (C. A. 2); *Carlson* v. *United States,* 187 F. 2d 366, 370 (C. A. 10), certiorari denied, 341 U. S. 940.

CONCLUSION

The record shows that this case is not within the principle on which marital confidences are privileged.

The record also shows that the petitioners formulated a scheme to defraud, in pursuance of which they caused a letter to be mailed, across state lines, containing a check which they had obtained by fraud, and that at the time the check was presented for payment, both petitioners were fully aware that it would have to be thus transported by mail and across state lines.

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The judgment below should be affirmed.
Respectfully submitted.

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